

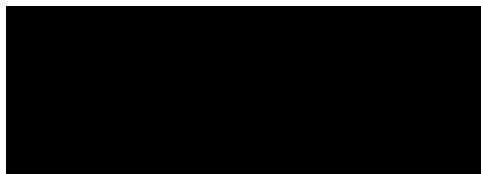
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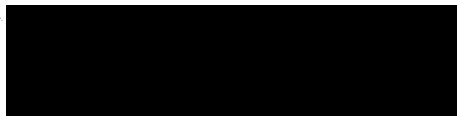
**U.S. Citizenship
and Immigration
Services**



D1

FILE: WAC 04 006 50885 Office: CALIFORNIA SERVICE CENTER Date: **NOV 18 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn although the petition is now moot.

The petitioner is a general building and engineering contractor. It desires to employ the beneficiary as a cement mason for one year. The director determined that the petitioner had not submitted a temporary labor certification from the Governor of Guam (Form GDOL 750) or notice stating that such certification could not be made and denied the petition.

On appeal, the petitioner states that there may have been an oversight on its part in not including the beneficiary's approved labor certification. The petitioner has now submitted the Form GDOL for review and consideration with the appeal. The AAO finds that the petitioner had obtained a temporary labor certification prior to the filing of the petition on October 7, 2003. Thus, the petitioner has overcome the grounds for denial of the petition on appeal. However, because the information was submitted late, the petition is now moot and the petition may not be approved. The petition is also not approvable for another reason.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

.....

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is peakload and that the temporary need is periodic.

To establish that the nature of the need is "peakload," the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The nontechnical description of the job on the Application for Temporary Alien Labor Certification (Form GDOL 750) reads:

Smoothes/finishes surfaces of poured concrete floor/walls/sidewalks/curbs to specified textures using hand/power tools including floats, trowels, screens [sic]. Spreads soft concrete to specified consistency using float to bring to surface and produce soft topping. Levels, smooths and

shapes surfaces of freshly poured concrete using straight edges and float or power screens. Finishes concrete surfaces using power trowel or wets and rubs concrete surfaces with abrasive stone to impart finish. Removes rough/defective spots from concrete surfaces using power grinder or chisel and hammer and patches holes with fresh concrete or epoxy compound. Molds expansion joints and edges; May sprinkle color stone chips to produce prescribed finish. May mix cement using hoe or concrete mixing machine.

The petitioner explains in his memorandum dated October 2, 2003 that the company is currently experiencing a peak demand for construction work and that the current labor force is insufficient to meet the needs for construction labor and services. If the petitioner is experiencing a severe labor shortage, it can be alleviated through the issuance of immigrant visas.

Moreover, the petitioner engages in building construction. The U.S. Department of Labor Field Memorandum No. 25-98, dated April 27, 1998, states in pertinent part: "The existence of a single short term contract in an industry such as construction does not, by itself, document temporary need if the nature of the industry is for long term projects which may have many individual contracts for portions of the overall project . . ." Generally, the petitioner has a permanent need to have workers available to fulfill its contracts, on a continuing basis, since that is the nature of the business.

The GDOL 750 shows that the certification was approved for three carpenters and one cement mason. In this instance, the petitioner states that it needs the services of the beneficiary in conjunction with some projects its company retained. However, the petitioner has not shown that it is experiencing an unusual increase in the demand for its products or services that is different from its ordinary workload in the construction business. The petitioner has not carefully documented the peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contract. The petitioner has not demonstrated that the additional personnel needed to fill the peakload position will be engaged in different duties or has different specialty skills than the 12 workers currently employed by the company. The petitioner has not provided evidence of its permanent staff. Absent evidence of the petitioner's "peakload" situation, the petitioner has not justified its need for the beneficiary's services.

This decision will have no practical effect because the period of requested employment (June 30, 2003 until June 30, 2004) has passed.

ORDER: The petition is denied because the matter is moot due to the passage of time.